No. 245.

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Supreme Court of the United States.

By W. W. Bigelow for Petitioner

OCTOBER TERM, 1901.

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HENRY L. WARD, TREASURER, *Petitioner*,

v.

HIRAM BLAKE AND WALLACE L. MASON,
EXECUTORS OF THE ESTATE OF EDWARD JOSLIN, *Respondents*,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER.

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1902

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v.

HIRAM BLAKE AND WALLACE L. MASON,
EXECUTORS OF THE ESTATE OF EDWARD JOSLIN, *Respondents*.

BRIEF FOR PETITIONER.

This case comes before this Court on a writ of *certiorari* to the United States Circuit Court of Appeals for the First Circuit.

Ward, Treasurer, *v.* Joslin, 180 U.S. 639.

STATEMENT OF THE CASE.

THIS is a suit by a judgment creditor of a corporation organized under the laws of Kansas to enforce against a stockholder in that corporation the liability prescribed by Article XII., Section 2, of the Constitution of Kansas, and by paragraph 1192 of the General Statutes of Kansas of 1889.

Article XII., Section 2, of the Constitution of Kansas is as follows: —

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations, nor corporations for religious or charitable purposes."

Paragraph 1192 is as follows: —

"If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The petitioner is a judgment creditor of The Western Investment Loan and Trust Company (hereinafter referred to as the Trust Company), which is not a railway or a religious or charitable corporation, but was organized for the purposes set forth in its charter (Record, p. 28) as follows: "To buy and sell personal property, including stocks, bonds, bills, notes, real and chattel mortgages, and choses in action of every kind and description, and to transact the business of a loan and trust company."

This case was begun on December 15, 1896, by an attachment in an action of debt, and was entered in the Circuit Court of the United States for the District of New Hampshire on May 8, 1897. The petitioner was the original plaintiff. The respondent in his answer set up "that the claim against the Trust Company, upon which a judgment in favor of the plaintiff against said company was founded, was not a due from or debt of said corporation for which the defendant as a stockholder in said corporation was liable under the constitution and laws of Kansas" (Record, p. 27); and also that the Trust Company "never had any authority to endorse the said promissory notes and obligations in the second count in plaintiff's declaration described or to guarantee the payment of said notes and obligations" (p. 27). The petitioner seeks to recover only on the first count of his declaration (Record, pp. 20–22).

The respondent testified that he became the owner in 1888 of one hundred shares of the Trust Company of a par value of fifty dollars each, and transferred them in 1894 to his grandson, without consideration, and under circumstances which showed that the transfer was colorable. The Circuit Court found as a fact "that the transfer was not such a *bona fide* transfer as to relieve the defendant from his individual liability as a stockholder if he were otherwise liable" (Record, p. 6).

The petitioner's judgment against the Trust Company was recovered upon the guaranty of three notes of twenty-five hundred dollars each. These notes were made by S. S. Hite and his wife, dated September 12, 1888, and payable on September 12, 1892, to J. E. Ethell at the office of the Trust Company in Topeka, Kans. (Record, p. 73). They were endorsed to the petitioner by Ethell "without recourse," and at the same time (p. 67) were guaranteed by the Trust Company as follows (p. 74): —

"TOPEKA, KANS., May 9, A.D. 1889.

"For a valuable consideration, The Western Investment Loan and Trust Company hereby guarantees payment of the within obligation, both principal and interest at maturity.

"THE WESTERN INVESTMENT LOAN AND TRUST COMPANY,
"By L. L. TURNER, *President*.

"Attest: SAM'L T. HOWE, *Secretary*.

"Negotiated by The Western Investment Loan and Trust Company, Topeka, Kans."

These three notes were secured by a trust deed from S. S. Hite and wife to one C. F. Jilson as trustee, and the Trust Company as a third party (Record, pp. 74–77). The Trust Company had the exclusive right under this deed to declare the notes due upon any default, to demand the foreclosure of the mortgage by Jilson, and to receive the proceeds of the mortgage to protect it on its guaranties.

The directors of the Trust Company had a meeting on August 7, 1888, and voted that the president and secretary be authorized to guarantee the payment of all securities negotiated by the company in one of three forms (Record, p. 43), the second of which was identical with the guaranty on the above notes, excepting that Form 2 authorized the guaranty of payment "within days after maturity," instead of "at maturity," as appeared on the notes.

Due service of the petitioner's writ was made on the president of the Trust Company (Record, pp. 6, 79), and judgment was recovered by default on March 7, 1893, in the District Court of Smith County in Kansas, for $9,787.50 and interest at 12 per cent. (p. 81). A payment was made on December 11, 1893, of $4,924.75. An execution issued for the balance, and on October 31, 1896, was returned wholly unsatisfied (p. 85). No evidence of *ultra vires* was offered by the respondent, and none appeared except what may be argued from the record of the petitioner's judgment against the Trust Company.

The Circuit Court made a finding of facts (Record, pp. 6, 7), that the petitioner had a valid judgment against the Trust Company with execution thereon returned wholly unsatisfied; that the respondent was a stockholder for five thousand dollars; that the petitioner's judgment was based "upon a guaranty, given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guaranty of the payment of securities negotiated by the company"; that this guaranty was not within the scope of the business of the Trust Company; and made a general finding for the respondent.

At the argument and before the findings of the Circuit Court the petitioner presented to the Court in a printed brief five propositions of law and requested the ruling of the Court thereon. The Court considered these propositions but declined to give them, as appears from the declaration of law (Record, pp. 16–18), and the petitioner then excepted to the refusal of the Court to adopt them in this case, and these exceptions were allowed (Record, pp. 8–11).

Assignments of Error.

The assignments of error which are material to this case are as follows (Record, pp. 13–16) : —

1. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"Upon all the evidence in the case the plaintiff is entitled to recover as a matter of law, and a finding should be made for the plaintiff for the full sum claimed in his declaration."

2. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"The execution in evidence in this case is an execution against the effects of a corporation within the meaning of paragraph 1192 of the General Statutes of Kansas, 1889."

3. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"The judgment and execution against The Western Investment Loan and Trust Company in evidence are included in the word 'dues' in Article XII., Section 2, of the Constitution of Kansas, and constitute such a 'due' as is secured by the individual liability of stockholders in corporations organized under the laws of Kansas."

4. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that —

"The guaranties of said corporation, which are declared on in the plaintiff's second, fourth and sixth causes of action in his suit against said corporation, as appears from the record in evidence, were not *ultra vires* or beyond the power of said corporation to make."

5. The Circuit Court erred in refusing to rule, and to adopt in the decision of this case, the proposition of law duly presented by the plaintiff, that—

"If the Court finds that said guaranties of said corporation were *ultra vires* and beyond the power of said corporation to make, that is no defence in this action."

13. The Circuit Court erred in not giving full faith and credit to the plaintiff's judgment and execution against The Western Investment Loan and Trust Company in evidence, as required by Article IV., Section 1, of the Constitution of the United States, and Section 905 of the Revised Statutes of the United States.

14. The Circuit Court erred in ruling that the facts specially found by the Court were sufficient to support a judgment for the defendant.

15. The Circuit Court erred upon the face of the record in entering judgment for the defendant.

Points and Authorities.

The petitioner seeks to recover upon the authority of

Whitman *v.* Oxford National Bank, 176 U.S. 559.
Hancock Bank *v.* Farnum, 176 U.S. 640.

Since this writ of *certiorari* was granted the respondent has died and the executors of his estate have taken upon themselves the defence of this action.

This liability survives against the estate of Edward Joslin.

Whitman *v.* Oxford National Bank, 176 U.S. 559, 567.
Richmond *v.* Irons, 121 U.S. 27, 55, 56.
Fidelity Insurance Co. *v.* Mechanics Bank, 97 Fed. Rep. 297, 300; 38 C. C. A. 193, 196.
Kisseberth *v.* Prescott, 91 Fed. Rep. 611.
Cooper *v.* Ives, 62 Kans. 395.
Plumb *v.* Bank, 48 Kans. 484.
Achenbach *v.* Pomeroy Coal Co., 2 Kans. App. 357.
3 Thompson, Corporations, sections 3320, 3321.
1 Cook, Corporations, 4th ed., section 248.

Public Statutes of New Hampshire, 1891, chap. 191:—

"Section 8. Actions of tort for physical injuries to the person — although inflicted by a person while committing a felony — and the causes of such actions, shall survive to the extent, and subject to the limitations, set forth in the five following sections, and not otherwise."

"Section 14. All other actions and causes of action existing in favor of or against a deceased person, except those for the recovery of penalties and forfeitures of money under penal statutes, shall survive, and may be prosecuted or defended by his administrator."

Tompkins *v.* Blakey, 49 Atlantic Rep. 111 (N.H.).

PETITIONER IS ENTITLED TO RECOVER ON FACTS FOUND.

Assignments of error 14 and 15 directly raise the point that the facts specially found by the Circuit Court are not sufficient to support a judgment for the respondent, but require a judgment for the petitioner. Assignments of error 2, 3, 4, 5, and 13 are also involved and discussed under this head.

The errors specified in assignments 14 and 15 would be available to the plaintiff in error though he had filed no bill of exceptions.

Allen *v.* St. Louis Bank, 120 U.S. 20, 30.
Insurance Co. *v.* Boon, 95 U.S. 117, 124.
Tyng *v.* Grinnell, 92 U.S. 467, 469.

I.

MATERIAL FACTS.

The material facts specially found are these (Record, p. 6): The respondent is liable as the owner of one hundred shares of the par value of fifty dollars each in the Trust Company, a corporation organized under the general laws of Kansas, which is not a railway or a charitable or religious corporation. The

petitioner in March, 1893, recovered a valid judgment against that company on the guaranty of certain notes for $9,787.50, bearing interest at 12 per cent. On December 11, 1893, $4,924.75 was paid thereon; and on September 15, 1896, execution was issued for the balance, and was returned wholly unsatisfied.

This Court and the Supreme Court of Kansas have both held that such a judgment and execution are conclusive on the stockholders of the corporation except when obtained by fraud or collusion.

Hancock National Bank *v.* Farnum, 176 U.S. 640.
Ball *v.* Reese, 58 Kans. 614.
Thompson *v.* Pfeiffer, 60 Kans. 409, 420.
Steffins *v.* Gurney, 61 Kans. 292, 294, 295.

This is the law almost universally, and has hitherto been the law of the First Circuit.

Hale *v.* Hardon, 95 Fed. Rep. 747, 757, 758, and cases cited; 37 C. C. A. 240.
Dexter *v.* Edmands, 89 Fed. Rep. 467.

It is immaterial that the judgment was rendered by default.

Steffins *v.* Gurney, 61 Kans. 292, 295.
Guerney *v.* Moore, 131 Mo. 650, 667.
Hale *v.* Hardon, 95 Fed. Rep., p. 760.
Holyoke Bank *v.* Goodman Co., 9 Cush. 576, 584.
Gaskill *v.* Dudley, 6 Met. 546.
Milliken *v.* Whitehouse, 49 Maine, 527, 529.
Came *v.* Brigham, 39 Maine, 35.
Hanson *v.* Davison, 73 Minn. 454.
Wilson *v.* Stockholders, 43 Pa. St. 424.

This doctrine proceeds upon the theory that "a stockholder is so far an integral part of the corporation, that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."

> Mr. Chief Justice Fuller in Hawkins *v.* Glen, 131 U.S. 319, 329.
> Hancock Bank *v.* Farnum, 176 U.S. 640, 644.

"All privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive on him with whom they are in privity."

> Mr. Chief Justice Waite in Litchfield *v.* Goodnow, 123 U.S. 549, 551, and cases cited.

The above facts specially found are all the material facts in the case, and upon those findings the petitioner is entitled to judgment.

II.

Immaterial Facts.

1.

"Ward's claim against the Trust Company was upon a guarantee, given upon a valuable consideration, of the payment of certain promissory notes from one third party to another, and was not a guarantee of the payment of securities negotiated by the company" (Record, p. 6).

a.

The guaranty by the Trust Company of notes negotiated by a third party would not be necessarily *ultra vires* (Fourth Assignment of Error). The person who negotiated them may have done so as trustee for the company. There is no finding

to the contrary. If negotiated by a trustee for the benefit of the company, they might be guaranteed by the company upon negotiation.

Talman *v.* Rochester Bank, 18 Barb. (N.Y.) 123.
Lyon *v.* First National Bank, 85 Fed. Rep. 120, 122; 29 C. C. A. 45, 47, 48.
Opdyke *v.* Railroad, 3 Dillon, 55, 72, 73.
Marbury *v.* Kentucky Land Co., 62 Fed. Rep. 335, 347, 350; 10 C. C. A. 393, 406.
Baxter *v.* Washburn, 8 Lea (Tenn.) 1, 15, 16.
Rogers Works *v.* Southern Assoc., 34 Fed. Rep. 278, 281.
New York Trust Co. *v.* Lombard Inv. Co., 73 Fed. Rep. 537, 549.

See also—

Railroad *v.* Howard, 7 Wall. 392, 412.
Green Bay Railroad *v.* Steamboat Co., 107 U.S. 98.
National Bank *v.* Mathews, 98 U.S. 621, 626.
National Bank *v.* Whitman, 103 U.S. 99, 101.
Fort Worth Co. *v.* Smith Bridge Co., 151 U.S. 294, 301.

It is not *ultra vires* for a banking institution to put assets into the name of an individual as trustee.

Schofield *v.* State Bank, 97 Fed. Rep. 282; 38 C. C. A. 179.

"Acts done by the corporation which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter."

Mr. Justice Story in Bank *v.* Dandridge, 12 Wheat. 64, 70.

Applied as a general rule in the following cases:—

McNitt *v.* Turner, 16 Wall. 352, 363, 364.
Carpenter *v.* Rannels, 19 Wall. 138, 146.
Cornett *v.* Williams, 20 Wall. 226, 249, 250.
Keely *v.* Sanders, 99 U.S. 441, 447.
Railroad *v.* Keokuk Co., 131 U.S. 371, 381.
Knox Co. *v.* National Bank, 147 U.S. 91, 97.
City Railroad *v.* Citizens Railroad, 166 U.S. 557, 568.

"When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid."

Mr. Justice Swayne, in Railroad *v.* McCarthy, 96 U.S. 258, 267.
Lexington *v.* Butler, 14 Wall. 282, 296.
Louisville R.R. *v.* Louisville Trust Co., 174 U.S. 552, 573.
Fuller *v.* Scott, 8 Kans. 25, 33.
Waynick *v.* Richmond, 11 Kans. 488.
Bissell *v.* Railroad, 22 N.Y. 258, 290.
Monument Bank *v.* Globe Works, 101 Mass. 57.
Manufacturing Co. *v.* Canney, 54 N.H. 295, 324–327.
Chautauqua Bank *v.* Risley, 19 N.Y. 369, 381, 382.
Farmers Loan Co. *v.* Curtis, 7 N.Y. 466, 470, 471.
Alward *v.* Holmes, 10 Abbott, N.C. 96, 99, 101.
Roussin *v.* St. Louis Ins. Co., 15 Mo. 244, 248.
Hart *v.* Ins. Co. 21 Mo. 91, 93.
McIntire *v.* Preston, 10 Ill. 48, 62.
Union Water Co. *v.* Fluming Co., 22 Calif. 620, 628, 629.

The petitioner was a holder of these notes and guaranties for value and before maturity (Record, p. 67), and is therefore pre-

sumed to be a *bona fide* holder. There is no finding to the contrary.

Lexington *v.* Butler, 14 Wall. 282.
Carpenter *v.* Longan, 16 Wall. 271.
Chambers Co. *v.* Clews, 21 Wall. 317, 323.
San Antonio *v.* Mehaffy, 96 U.S. 312.
Louisville R.R. *v.* Louisville Trust Co., 174 U.S. 552, 575.

The legislature of Kansas has recognized the right of loan and trust companies to issue debenture bonds.

Chapter 23, Article 3, Section 15, of the Compiled Laws of Kansas of 1885, is as follows: —

"Section 15. Corporations shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation."

This was amended by Chapter 109, Section 1, of the Laws of Kansas for 1889, by adding thereto the following: —

"Provided, however, that the provisions of this section shall not apply to the debentures or bonds of any loan or trust company, duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by a transfer of real estate or by other securities for the benefit and protection of purchasers of said debentures or bonds; such collateral to be at least equal in amount to the par value of such bonds or debentures, and all real estate mortgage securities to be first liens on the property on which loans are made."

This act recognizes and ratifies the right of loan and trust companies to issue debenture bonds secured by first mortgages on real estate or by other securities. A debenture bond is "practically a note of the corporation secured by the securities as collateral; in other words, it is a note secured by a pledge of securities."

Cook on Corporations, 4th Ed., Vol. II., Section 776, p. 1777.

"The name is not of the slightest consequence."

Schofield, J., in Ward *v.* Johnson, 95 Ill. 215, 239.

There is no real distinction between such debenture bonds and the guaranties of the Trust Company in this case. The guaranties are obligations in the name of the Trust Company secured by a real estate mortgage and also by the signatures of the makers of the notes. The guaranties were made on May 9, 1889 (Record, p. 74), and were therefore fully authorized by the act which took effect on March 14, 1889. The charter of the Trust Company is broad enough to cover such choses in action as these guaranties secured by real estate.

Parkinson *v.* Bank, 60 Kans. 474, 477.
McCormick *v.* Market Bank, 165 U.S. 538, 550.

If under any possible circumstances the guaranty by the Trust Company of notes negotiated by a third party could be valid, such guaranties must in this case be presumed to be valid. Such a presumption would be warranted by any of the following suppositions: That the courts of Kansas might interpret the act of March 14, 1889, to apply to these guaranties as debentures and thus to authorize them; that Ethell might have negotiated the notes only as trustee for the Trust Company and for its benefit, and that the guaranties in that case would be valid; that the guaranties were within the charter powers of the Trust Company "to buy and sell personal property" and "choses in action of every kind and description"; or that the courts of Kansas would not hold such guaranties invalid under any circumstances. These presumptions should all be made in favor of the guaranties and the petitioner's judgment thereon.

If in order to sustain the legality of those guaranties other facts must exist, such as the fact that Ethell negotiated the notes only as trustee for the Trust Company and for its benefit, then those facts are presumptively proved by the act of the

Trust Company in making the guaranties. The contract is not necessarily beyond the scope of the power of the corporation, and in the absence of proof to the contrary it is presumed to be valid.

b.

If, however, these guaranties were *ultra vires*, and if the finding of the Circuit Court should be so interpreted, that would not be material after judgment on those guaranties (Fifth Assignment of Error). A judgment on an *ultra vires* claim is just as conclusive as a judgment on any other claim.

Franklin Co. *v.* German Bank, 142 U.S. 93.
U. S. *v.* New Orleans, 98 U.S. 381, 395, 397.
Wilson's Executor *v.* Deen, 121 U.S. 525, 534.
Board of Com'rs *v.* Platt, 79 Fed. Rep. 567, 572; 25 C. C. A. 87, 91.
Ætna Ins. Co. *v.* Lyon Co., 44 Fed. Rep. 329, 344.
U. S. *v.* Board of Auditors, 28 Fed. Rep. 407.

"A judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it."

Mr. Justice Field in Davis *v.* Brown, 94 U.S. 423, 428.
Cromwell *v.* County of Sac, *Ibid.* 351, 352.
Keokuk R.R. *v.* Missouri, 152 U.S. 301, 315.
Comstock *v.* Crawford, 3 Wall. 396, 406.
Grignon *v.* Astor, 2 How. 319, 340.

"What is implied in a record, pleading, will, deed, or contract is as effectual as what is expressed."

Mr. Justice Swayne in Cornett *v.* Williams, 20 Wall. 226, 250.
U. S. *v.* Babbitt, 1 Black, 55, 61.

The conclusiveness of a judgment does not depend upon the reasons for the judgment, but upon the fact of a judgment.

So. Pac. R.R. *v.* U. S., 168 U.S. 1, 48–52, and cases cited.
Citizens Bank *v.* Brigham, 61 Kans. 727.

A judgment by default is just as conclusive as one rendered after answer and contest.

Last Chance Mining Co. *v.* Tyler Mining Co., 157 U.S. 683, 691.

A judgment is binding although the cause of action was barred by a discharge in bankruptcy which was not pleaded.

Dimock *v.* Revere Copper Co., 117 U.S. 559.

So also though barred by the statute of limitations which was not pleaded.

Schnack *v.* Boyd, 59 Kans. 275, 278.
Head *v.* Daniels, 38 Kans. 1, 5.

So also though barred by usury which was not pleaded.

Charles *v.* Davis, 62 N.H. 375.

A foreclosure decree is binding upon parties and privies as to defences not set up.

Stout *v.* Lye, 103 U.S. 66.

The case of Schrader *v.* Manufacturers Bank, 133 U.S. 67, holds that after a national bank has gone into liquidation its officers have no authority to transact any new business in the name of the bank so as to bind its stockholders. The transaction upon which the judgment in that case was based took

place "about a year after the bank went into voluntary liquidation" (p. 77), while the suit in which that judgment was recovered "was not commenced until more than three years after the Manufacturers Bank went into liquidation." Such facts show fraud, and such a judgment would be a fraud on the stockholders, and on that ground they would not be bound by it.

The finding in the present case that the petitioner recovered judgment on these guaranties necessarily involves the finding that the Trust Company made the guaranties, and is conclusive on the Trust Company and the defendant. The respondent ought not to be permitted, under the guise of examining the petitioner's claim against the company, to allege that the petitioner has no valid claim against it, and without proof to impeach the petitioner's judgment against the company. To say that "dues" does not include such a judgment is only to say in another form of words that a conclusive judgment is not conclusive.

c.

There is no finding that the petitioner's judgment was obtained by fraud or collusion, but on the contrary the finding is that his "writ was served upon the president of said corporation" (Record, p. 6). In the absence of fraud and collusion no other ground is recognized by the courts of Kansas for permitting a stockholder to attack a judgment against the corporation.

"The nature of the liability and the time and mode of its enforcement are to be determined from the statutes, and not by the notions which particular courts might entertain as to what would be equitable and just in such cases. The provisions of the statute in question, which fix the liability of a stockholder, are plain, and leave little room for interpretation."

Johnston, J., in Sleeper *v.* Norris, 59 Kans. 555, 558.

Where a statute is clear and free from all ambiguity the letter of it is not to be disregarded.

St. Paul Railway *v.* Phelps, 137 U.S. 528, 536.
Bate Co. *v.* Sulzberger, 157 U.S. 1, 39, 40.
Lake Co. *v.* Rollins, 130 U.S. 662, 671.

If the respondent had apprehended any fraud, collusion, or dereliction of duty in the officers of the Trust Company, knowing as he did that the corporation was in financial straits and had not declared a dividend for two and a half years prior to the petitioner's suit against the company (Record, pp. 54, 55, 59, 60), he had the right to intervene and defend in that suit.

Fitzwater *v.* National Bank, 62 Kans. 163.
Mining Co. *v.* McKibben, 60 Kans. 387.

The Circuit Court found that these guaranties were "given upon a valuable consideration" (Record, p. 6). It is clear that the petitioner could recover that consideration, either directly upon the theory of estoppel or by an action of *quantum meruit*.

Central Trans. Co. *v.* Pullman Co., 139 U.S. 24, 57–61; 171 U.S. 138, 150, 151.

If the Trust Company had answered to the petitioner's suit and claimed that the guaranties were *ultra vires*, the petitioner might then have set up any facts necessary to permit him to recover for a *quantum meruit*. It must be presumed that the consideration paid the Trust Company for its guaranties was the amount which the petitioner recovered in his judgment against that company, even though his original petition was defective.

Manley *v.* Park, 62 Kans. 553.

The Trust Company and its stockholders have had the benefit of that money. There is certainly no equity in favor of the respondent stockholder which should permit him to impeach that judgment.

2.

There is no finding that the guaranties were not within the scope of the directors' resolution in form, apart from the finding

that they were not valid because not negotiated by the Trust Company.

Form 2 of the resolution (Record, p. 43) authorizes a guaranty of payment "within days after maturity," while the guaranties on the notes (Record, p. 74) guarantee payment "at maturity." Form 2 would authorize a guarantee of payment one day after maturity, while the actual obligation authorizes payment one day earlier than that. This is substantial agreement with the resolution. There is a presumption that the guaranties were within the powers of the corporation and its officers.

Bank *v.* Atkinson, 8 Kans. App. 30, 33.
Town Co. *v.* Swigart, 43 Kans. 292.
Morisette *v.* Howard, 62 Kans. 463.
Express Co. *v.* R.R., 99 U.S. 191, 199.

3.

"Ascertaining the relations of the parties under the contract, which resulted from the Kansas Constitution and the statutes and the defendant's ownership of stock, I find, so far as it is a question of fact, that the dues to be secured by the superadded stockholders' liability were such as were within the reasonable and proper scope of the business as contemplated by the parties, and that a guarantee of this character was not intended by the defendant stockholder, and was not contemplated by the Kansas Constitution as a due or a debt within such scope" (Record, p. 7).

a.

The contractual relation between the respondent stockholder and the petitioner creditor of the corporation is implied by law, and is not a question of fact in any sense.

Railroad *v.* Gebhard, 109 U.S. 527, 537, 538.
Howarth *v.* Lombard, 175 Mass. 570, 574–576, and cases cited.

It is conceded that the word "dues" includes all contractual obligations (Record, p. 90). This is in accordance with all the authorities.

Whitman *v.* Oxford National Bank, 176 U.S. 559, 563.
Chase *v.* Curtis, 113 U.S. 452, 463.
Rider *v.* Fritchey, 49 Oh. St. 285, 295.
Herrick *v.* Wardwell, 58 Oh. St. 294, 309.
Flenniken *v.* Marshall, 43 So. Car. 80, 85.

See also —

Grund *v.* Tucker, 5 Kans. 70, 77.
Haynes *v.* Brown, 36 N.H. 545, 566.
Smith *v.* Qmans, 17 Wisc. 395, 396.
Powell *v.* Oregonian Co., 36 Fed. Rep. 726; 38 Fed. Rep. 187.

Paragraph 1192 of the General Statutes of Kansas, 1889, is remedial and not penal.

Frame *v.* Ashley, 59 Kans. 477.
Cottrell *v.* Manlove, 58 Kans. 405.
Gen. Sts. of Kansas, 1889, par. 7281.

Paragraph 7281. "The rule of the common law, that suits in derogation thereof shall be strictly construed, shall not be applicable to any general statute of this State; but all such statutes shall be liberally construed to promote their object."

It is clear that the guaranties which were the petitioner's original claim against the Trust Company are contractual obligations. They are therefore "dues" within the meaning of the Constitution of Kansas (Third Assignment of Error). They cannot be construed a nullity after judgment upon them. If they are disregarded, however, the petitioner has a clear claim against the Trust Company for the value paid for them under the finding that they were "given upon a valuable considera-

tion" (Record, p. 6), and it must be presumed that the consideration paid the Trust Company for its guaranties was the amount which the petitioner recovered in his judgment against that company. In either case the petitioner has a valid judgment against the company which is contractual in its nature.

b.

The petitioner makes the further claim (Second Assignment of Error), that the execution returned unsatisfied, as found by the Circuit Court, is an execution against the effects of a corporation within the meaning of paragraph 1192 of the General Statutes of Kansas, 1889. This raises a question which is not limited to the interpretation of the word "dues" in the Constitution of Kansas. The constitutional provision, Article XII., Section 2, is mandatory, or at least directory, on the legislature of Kansas; but it is not a limitation on the power of the legislature to impose any liability it sees fit upon stockholders in corporations other than railways or religious or charitable corporations.

"The Constitution contains no grant of powers to the legislature. It is only a limitation on the exercise of its authority; and the legislature, in its discretion, has the right to pass any act not violative of the State or Federal constitutions."

Horton, C. J., in Castle *v.* Houston, 19 Kans. 417, 427.
Leavenworth Co. *v.* Miller, 7 Kans. 479.
Cooper *v.* Telfair, 4 Dallas, 14.
Fletcher *v.* Peck, 6 Cranch, 87, 135, 136.
Bolles *v.* Brimfield, 120 U.S. 759, 761.
Cooley on Constitutional Limitations, 6th ed., pp. 104–106, and cases cited.

If the word "dues" is construed to mean only a certain class of debts, the Constitution of Kansas does not prohibit the legislature from enacting such laws as it sees fit, to secure all kinds of liabilities from corporations by making their stockholders liable. It is submitted that this is what the legislature of Kansas has done in enacting paragraph 1192.

4.

It is immaterial what the respondent may have known about the business of the Trust Company with reference to these guaranties (Record, p. 7). To the petitioner's judgment on a contractual claim the respondent has no defence, whether he was cognizant of the transaction or not.

III.

Judgment Should Be Ordered for the Petitioner.

Under the material facts found, the general finding for the defendant was error. The special finding covers all the issues raised by the pleadings, and this Court should direct such judgment to be entered as the special finding requires.

Allen *v.* St. Louis Bank, 120 U.S. 20, 40.
Fort Scott *v.* Hickman, 112 U.S. 150, 165, and cases cited.
Evans *v.* Kister, 92 Fed. Rep. 828, 833; 35 C. C. A. 28, 33.

Under the foregoing authorities the petitioner asks this Court to reverse the judgment and order the Circuit Court to enter judgment for the petitioner for the amount claimed by him, five thousand dollars, with interest from the date of the writ, December 15, 1896 (Record, p. 3), at six per cent., and the petitioner's costs of this Court, the Circuit Court of Appeals, and the Circuit Court.

The plaintiff is entitled to interest, as damages for detention, from the date of the writ.

Pine *v.* Western Nat. Bank, 65 Pac. Rep. 690 (Kans.).
Casey *v.* Galli, 94 U.S. 673, 677.
Bowden *v.* Johnson, 107 U.S. 251, 263.
Burr *v.* Wilcox, 22 N.Y. 551, 557.
Mason *v.* Alexander, 44 Oh. St. 318, 336.
Bank *v.* McDonnell, 92 Ala. 387, 398.
Rikhoff *v.* Brown's Machine Co., 68 Ind. 388, 390.
Allen *v.* Fairbanks, 45 Fed. Rep. 445.
3 Thompson, Corporations, sect. 3133.

The same principle is applicable as in cases where interest is allowed in excess of the penalty of a bond.

Ives *v.* Merchants Bank, 12 How. 159.
U. S. *v.* Arnold, 1 Gallison, 348, 360; 9 Cranch, 104.
Bank of U. S. *v.* Magill, 1 Paine, 661, 669.
Burchfield *v.* Haffey, 34 Kans. 42.
Judge of Probate *v.* Heydock, 8 N.H. 491, 494.
Wyman *v.* Robinson, 73 Maine, 384.
Bank of Brighton *v.* Smith, 12 Allen, 243, 251–253.

See as to costs —

Abbey *v.* Long, 44 Kans. 688, 693.

The rate of interest should be six per cent.

Public Statutes of New Hampshire, 1891, Chap. 203, Sect. 1: "In rendering judgments, and in all business transactions where interest is paid or secured, it shall be computed and paid at the rate of six dollars on a hundred dollars for one year, unless a lower rate is expressly stipulated."

IV.

The Petitioner Is Entitled to Judgment upon All the Evidence.

The petitioner duly presented his propositions of law and requested the Circuit Court to rule on them; and the Court considered them and did rule on them (Record, p. 9). The refusal of the Court to adopt them in the decision of this case gives the petitioner a right of exception.

Norris *v.* Jackson, 9 Wall. 125, 128.
Ins. Co. *v.* Sea, 21 Wall. 158, 160.
Lehnen *v.* Dickson, 148 U.S. 71, 73.
Mercantile Trust Co. *v.* Wood, 60 Fed. Rep. 346, 348; 8 C. C. A. 658.
Clement *v.* Phœnix Ins. Co., 7 Blatchf. 51, 53.

The petitioner requested the Circuit Court to rule that upon all the evidence in the case he was entitled to recover as a matter of law (First Assignment of Error). His exception to the refusal of the Court to give this ruling raises a question of law.

St. Louis *v.* Western Union Tel. Co., 148 U.S. 92, 96.
Lehnen *v.* Dickson, 148 U.S. 71, 73.
Ins. Co. *v.* Folsom, 18 Wall. 237, 251.
World's Col. Exp. *v.* France, 96 Fed. Rep. 687, 689; 38 C. C. A. 483.

If for any reason this Court shall say that the petitioner is not entitled to recover upon the facts specially found by the Circuit Court, the petitioner maintains that he is entitled to a new trial upon his exceptions to the refusal of the Circuit Court to give the rulings set out in his assignments of error 1, 2, 3, 4, and 5 (Record, pp. 9, 13, 14).

The petitioner's judgment and execution stand unattacked (Record, pp. 66–86) and are conclusive on the respondent, as has already been argued. The existence of the corporation was not denied. The charter was in evidence (Record, p. 28), and also the corporate records showing its organization (Record, pp. 41, 42). It is not a railway or a religious or charitable corporation (Record, pp. 6, 28).

The respondent admitted in his deposition that he purchased one hundred shares of the Trust Company in 1888 of a par value of fifty dollars a share (p. 51, Ints. 3, 4); that on June 9, 1894, he transferred these shares to Frederick E. Kingsbury (p. 52, Ints. 5, 6), who was his grandson (p. 61, Int. 2); that the transfer was without any consideration (p. 56, Cr. Int. 39); that his grandson at that time had no visible attachable property (p. 57, Cr. Ints. 44, 45) and had none at the time of this action (p. 57, Cr. Ints. 45, 46; p. 63, Cr. Int. 32); that he knew business was oppressed in 1893 and 1894, and Kansas companies stopped paying dividends, and as a general thing had to succumb (pp. 59, 60, Cr. Ints. 75, 76, 79, 80); that he would suspect something was wrong if any company passed its divi-

dends (p. 55, Cr. Ints. 15, 16, 17, 18); that he received no dividends from the Trust Company after July 1, 1890 (p. 54, Cr. Ints. 4, 8, 9, 10, 11); that he had already been sued on his Kansas stockholder's liability in another company before he transferred these shares (p. 53, Ints. 20, 21, 22); and that he transferred these shares "to avoid expense of defending suits and trouble," and considered there was value in the stock, and he had rather the value of the stock should go to his family than to expend it in defending suits (p. 53, Ints. 20, 21, 22; p. 56, Cr. Ints. 28, 29, 33, 34, 35).

James A. Troutman, the president of the Trust Company, testified that the company was insolvent on January 1, 1891, and since that time (Record, p. 32, Ints. 34, 35); and that it issued no financial statement later than August 26, 1891 (Record, p. 33, Ints. 40, 41, 42). This evidence was not contradicted.

Upon the foregoing testimony and admissions of the respondent and his grandson, the Circuit Court found as a fact "that the transfer was not such a *bona fide* transfer as to relieve the defendant from his individual liability as a stockholder if he were otherwise liable" (Record, p. 6). Upon those facts the Circuit Court was bound as a matter of law to find that the transfer was colorable and that the respondent was still liable as a stockholder. Indeed, this is not disputed.

VanDemark *v.* Barons, 52 Kans. 779, 782.
Johnson *v.* Laflin, 5 Dillon, 65; 103 U.S. 800.
National Bank *v.* Case, 99 U.S. 628.
Bowden *v.* Johnson, 107 U.S. 251.
Pauly *v.* Trust Co., 165 U.S. 606, 619.
Stuart *v.* Hayden, 169 U.S. 1, 9.
Foster *v.* Lincoln, 79 Fed. Rep. 170; 24 C. C. A. 470.
Cox *v.* Montague, 78 Fed. Rep. 845; 24 C. C. A. 364.
Houghton *v.* Hubbell, 91 Fed. Rep. 453; 33 C. C. A. 574.
Corey *v.* Morrill, 71 Vt. 51, 57.
Rider *v.* Fritchey, 49 Oh. St. 285.
Pinkerton *v.* R.R., 42 N.H. 424.
Coolidge *v.* Melvin, 42 N.H. 510.
Gove *v.* Campbell, 62 N.H. 401.

The only defence made by the respondent is that the guaranties upon which the petitioner's judgment against the Trust Company was obtained were *ultra vires*. The petitioner replies that there is not a scintilla of evidence tending to show that the guaranties were *ultra vires* in any of the depositions nor in the record evidence, except what may be argued from the judgment record.

A judgment conclusively establishing that the petitioner's claim is valid against the Trust Company is not evidence that his claim is *ultra vires*. A judgment does not impeach itself.

Not only is the judgment record no evidence of *ultra vires*, but on the face of the record it appears affirmatively that the guaranties were negotiated by Ethell entirely for the benefit of the Trust Company. That record shows that the notes in question were endorsed by Ethell "without recourse" (Record, p. 74); "that at the time of the endorsement of said notes to this plaintiff" the Trust Company guaranteed the payment of them for value (p. 67); that they were payable at the office of the Trust Company (p. 73); that the mortgage deed given to secure the notes ran to a trustee for the benefit of the Trust Company (pp. 74–77); and that the Trust Company had the exclusive right to declare the notes due upon any default, to demand the foreclosure of the mortgage, and to receive the proceeds of the mortgage to protect it on its guaranties (p. 77).

This Court has held that there is no inference that an endorsement "without recourse" is for value paid to the endorser.

"Nor under this endorsement, which is an assignment of the note without expressing value received, and that, too, without recourse against the assignor, can it be fairly inferred that the nominal value of the note was actually paid."

> Chief Justice Marshall in Welch *v.* Lindo, 7 Cranch, 159, 163.
> See Robinson *v.* Lincoln, 5 Met. (Mass.) 201, 204.

The guaranties are expressed to be for a valuable consideration. It is a fair inference from the foregoing facts that the value was paid to the Trust Company at the time these notes

were negotiated and guaranteed, and that the Trust Company was the party beneficially interested in the transaction. The vote of the directors (Record, p. 43) authorized the guaranty of "securities negotiated by the company." The presumption must be that these securities were really negotiated by the company, in the absence of evidence to the contrary. They are endorsed "Negotiated by The Western Investment Loan and Trust Company, Topeka, Kans." (p. 74).

The notes and mortgage deed are to be construed together.

Moline Plow Co. *v.* Webb, 141 U.S. 616, 625.

The Trust Company seems to have followed the usual course of business in Kansas.

Crissey *v.* Loan Co., 59 Kans. 561, 562.
See Van Pelt *v.* Strickland, 60 Kans. 584.

In addition to the statutes already cited, the petitioner would call attention to the following paragraphs of the Compiled Laws of Kansas of 1885: —

"(1136) Section 11. Every corporation, as such, has power:

"Sixth. To make by-laws, not inconsistent with existing laws, for the management of its property, the regulation of its affairs, and for the transfer of its stock.

"Seventh. To enter into any obligation or contract essential to the transaction of its ordinary affairs."

The following decisions of the Supreme Court of Kansas seem to sustain the petitioner's position: —

Commercial Bank *v.* Provident Institution, 59 Kans. 361, 365, and cases cited.
Railroad *v.* Johnson, 58 Kans. 175.
Railroad *v.* Fletcher, 35 Kans. 236, 250.

The case of Commercial Bank *v.* Provident Institution, in particular, seems to imply that if the guaranty is made in the

interest of the bank it would not be *ultra vires*, and, in any event, that every presumption should be made in its favor.

In that case it is said at page 364 : —

"The record before us does not contain any of the evidence offered at the trial. The general finding resolves all doubt as to the facts against the plaintiff in error. We must, therefore, presume that the guaranty was executed for a valuable consideration, by the duly authorized officers of the bank, and in due course of business. The claim that a banking institution dealing in commercial paper is without authority to bind itself by a guaranty thereof has nothing to commend it to especial favor. It is true that in this case the paper itself does not indicate that the Commercial Bank ever owned it. Nevertheless it may have received the proceeds, and the guaranty may have been made strictly in the interest of the bank."

Under the law of Kansas (General Statutes of 1889) a contract in writing imports a consideration.

Paragraph 1104. "All contracts in writing, signed by the party bound thereby, or his authorized agent or attorney, shall import a consideration."

The pleadings in the petitioner's action against the Trust Company allege a consideration paid by the petitioner in purchasing the note with the guaranties (Record, pp. 67, 68, 69). His judgment conclusively establishes that. The burden of proof is on the respondent to show that the guaranties were *ultra vires*. He has failed to produce any such proof.

As already argued, every presumption should be made in support of the validity of the petitioner's judgment against the Trust Company on these guaranties. There is no evidence whatever to impeach that judgment. The guaranties on the face of the record do not appear to be necessarily beyond the scope of the power of the corporation; they appear to be authorized under Chapter 109 of the laws of Kansas of 1889; they appear to have been negotiated by Ethell for the benefit of the Trust Company and not of himself; the act of the Trust Company in making them is presumptive proof of any facts necessary to make them legally operative; they were "given upon a valuable consideration," as the Circuit Court found; and the petitioner

must be presumed upon all the evidence to be a *bona fide* holder of them. In the utter absence of any evidence to invalidate them, the Circuit Court was bound to enforce the petitioner's judgment upon them (Thirteenth Assignment of Error).

Hancock Bank *v.* Farnum, 176 U.S. 640.

There is no evidence of *ultra vires*, and the petitioner is entitled to recover on all the evidence as a matter of law.

The second assignment of error raises the question that the petitioner's execution is an execution against the effects of a corporation within the meaning of paragraph 1192, and that such an execution is not limited by the word "dues" in the constitution.

The third assignment of error raises the question that the petitioner's judgment and execution are included in the word "dues" of the Constitution of Kansas, and are contractual obligations, founded either upon the guaranties of the Trust Company, or, rejecting them, upon a *quantum meruit* for the value paid for those guaranties.

The fourth assignment of error raises the question that those guaranties are not *ultra vires*.

The fifth assignment of error raises the question that if they are *ultra vires* that fact is immaterial, after judgment upon them, and is no defence.

These questions have all been fully argued by the petitioner upon the proposition that the facts specially found require a judgment for the petitioner. He reaffirms those arguments and authorities in arguing that he is entitled to recover upon all the evidence as a matter of law.

If the petitioner is not entitled to judgment upon the facts found, he is certainly entitled to a new trial for the refusal of the Circuit Court to give the rulings requested by him, and in that case the judgment should be reversed.

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